Eight Mile Style, LLC et al v. Apple Computer, Incorporated
Doc. 133

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

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INDEX OF AUTHORITIES

Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005)

Pears v. Mobile County,
No. 08-0385-WS-B, 2009 U.S. Dist. LEXIS 69826 (S.D. Ala. Aug. 7, 2009)

Pinkham v. Sara Lee Corp., 983 F.2d 824, 829 (8th Cir. 1992)

Scheidecker v. Arvig Enters., 193 F.R.D. 630, 632 (D. Minn. 2000)

Turtle v. Sanctuary Records Group, Inc.,
No. C-03-3922 MMC, 2005 U.S. Dist. LEXIS 37418 (N.D. Cal. Sept. 20, 2005)

Plaintiffs moved to amend the complaint in this action to add claims of direct, contributory and vicarious infringement against Defendant Aftermath, who voluntarily intervened in this action shortly after it commenced. As described in Plaintiffs' motion, evidence from Aftermath has taken center stage: 16 of the 19 depositions Plaintiffs have taken were of Aftermath's current or former employees, and nearly every document Defendants produced was from of Aftermath, not Apple – over 20,000 pages versus only 3,000. The claims against Aftermath in Plaintiffs' proposed amended complaint are based on essentially the same facts as claims against Apple: whether Aftermath had the right to authorize Apple to offer Plaintiffs' Compositions to consumer as permanent downloads via Apple's iTunes service. Plaintiffs will use neither new witnesses nor new documents to prove these claims, instead relying on witnesses already disclosed or deposed. Nor would the proposed amendment require the production of new documents for damages purposes, since Aftermath already produced profit and loss statements for the 44 compositions it distributed. Defendants simply cannot show that additional witnesses or documents be required to prove the claims added in Plaintiffs' proposed amendment.

1. Amending the Scheduling Order is Not Required

Defendants incorrectly claim Plaintiffs' motion comes after the deadline in the scheduling order for amending the complaint and cannot satisfy the "good cause" standard for modifying such orders. First, no scheduling order in this case has ever set a deadline for moving to amend the complaint. *See* Doc. Nos. 20, 119, 123, 126. The first scheduling order (Doc. No. 20) did contain a deadline to add parties, February 2, 2008, but Aftermath voluntarily made itself a Defendant on September 7, 2007, well before that deadline was even set. *See* Doc. No. 8. The scheduling order also included a "Motion cut-off" deadline of July 16, 2008, two months after what was then the close of discovery. Doc. No. 20. Since then, discovery has been extended multiple times, most recently through August 28, 2009 for the limited purpose of taking certain depositions, and trial is set to begin September 22, 2009. Doc. No. 126. None of the orders amending the dates first set in the Scheduling Order ever addressed the "Motion cut-off" date. Doc. Nos. 119, 123, 126. Both parties have treated the original July 16, 2008 deadline as not in effect, having filed numerous motions after that date, *e.g.,* Doc. Nos. 80, 107, 120, 128.

Defendants' first argument, that Plaintiffs must demonstrate "good cause" because the deadline to amend the complaint "came and went," is false, since no such deadline was ever set.

2. Plaintiffs Have Good Cause to Modify the Scheduling Order

Even if good cause were required, Plaintiffs have demonstrated ample cause for the timing of their motion. This motion comes shortly after it became clear that Defendants would stand by their objections concerning Plaintiffs' right to recover damages from Aftermath. Plaintiffs' uncertainty in this regard is demonstrated by comparing the contemporaneous inconsistent statements of Defendants in filings with the Court, variously claiming either that no infringement had been asserted against Aftermath (*e.g.,* Doc. No. 132 at 10-11) or that Plaintiffs alleged that *both* "Aftermath Records ("Aftermath") and Apple Inc. ("Apple") (jointly "Defendants") have infringed upon Plaintiffs' claimed copyrights…" and that Plaintiffs sought "Aftermath's profits attributable to the alleged infringement," to name just two contrary examples. Doc. No. 38, Defendants' Motion to Bifurcate, at 7 of 26, 8 of 26. Defendants' inconsistent claims are the sole explanation and provide ample cause for the timing of the instant motion. Uncertainty about whether a party would take a given position is itself "good cause" for modifying the scheduling order, if indeed such modification were required in the instant case.

See, e.g., Scheidecker v. Arvig Enters., 193 F.R.D. 630, 632 (D. Minn. 2000) (finding good cause where the defendants were "somewhat coy" about the identity of the proper defendant); *Pears v. Mobile County*, No. 08-0385-WS-B, 2009 U.S. Dist. LEXIS 69826 (S.D. Ala. Aug. 7, 2009) (good cause, in part, where the answer filed by defendants' and statements of a witness in deposition mislead plaintiff as to the correct name of one defendant).

3. Defendants Fail to Demonstrate Prejudice

Defendants argue that allowing the amendment Plaintiffs propose would cause them "severe prejudice" because the claims of contributory and vicarious infringement "require[] proof of elements that have never before been at issue in this case." Doc. No. 132. Defendants go on to correctly describe the differing standards under direct, contributory and vicarious infringement, ignoring the reality that it is Plaintiffs who must meet their burden of proof, not Defendants. Thus, *Plaintiffs* will have to show Aftermath's "*knowledge*" of the infringement and "the element of *inducing, causing or materially contributing*" to Apple's infringement in order to prove Aftermath's contributory infringement, and Aftermath's "*right and ability to supervise*" and direct financial interest to prove vicarious infringement. *Id.* at 16 (emphasis in original). To the extent that insufficient discovery has been taken on these elements, Plaintiffs will suffer by not being able to meet their burden of proof, not Defendants; this cannot constitute prejudice to Defendants. Of course, as argued in Plaintiffs' motion, discovery on these issues *has* been taken, and Plaintiffs intend to meet their burden largely by relying on deposition testimony of Defendants' own witnesses and documents produced by Defendants long ago.

Defendants claim they would have to develop "significant additional evidence" to respond to these claims, but give only two examples. Initially, Defendants state they would have to "scramble to identify and prepare witnesses" to testify concerning Aftermath's "good faith belief" their actions were authorized. Doc. No. 132 at 16. Initially, Defendants do not support their implicit argument that a "good faith belief" is relevant to contributory infringement, no doubt because "innocence" or "good faith belief" is not a defense to copyright infringement. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (quoting *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978)). Even if Aftermath's "good faith belief" were relevant, it is patently false to suggest that Aftermath's state of mind as it purported to issue licenses in Plaintiffs' Compositions to Apple is novel. Both parties took extensive discovery into Aftermath's (and it's part-owner, UMG Recordings Inc.'s) practice of sending out license requests to publishers, including Plaintiffs, Plaintiffs' negotiation of a license for permanent downloads of one composition, and Plaintiffs' denial of subsequent license requests. *See* Doc. No. 74 at 10-14. One of the main arguments Defendants raised in their motion summary judgment, that Plaintiffs granted "implied licenses" in the compositions, is based on essentially this very issue. *See, e.g., Turtle v. Sanctuary Records Group, Inc.*, No. C-03-3922 MMC, 2005 U.S. Dist. LEXIS 37418 (N.D. Cal. Sept. 20, 2005) (rejecting defense of implied license where defendants failed to offer evidence that they reasonably believed in good faith that they had obtained an implied license). In July 2008 Defendants moved for summary judgment on this theory; they cannot now claim they will be prejudiced if *more* discovery on this issue is not taken.

Defendants also disingenuously claim ignorance as to what evidence Plaintiffs will offer to prove Aftermath's ability to supervise and control the infringing conduct of Apple. Doc. No. 132 at 16-17. Plaintiffs' claims in this regard are based on the contracts between UMG Recordings, Inc. and Apple, long since produced, which give Aftermath the right to demand that

Apple remove and destroy all copies of any recording Aftermath provided it from its iTunes store. This aspect of these contracts was explored in detail in depositions taken over a year ago.

4. The *F.B.T.* case is Unrelated to Plaintiffs' Motion

Finally, Defendants claim the timing of Plaintiffs' motion was made to "preserve a litigation position" in the *F.B.T. v. Aftermath* case in the Central District of California. Doc. No. 132 at 4, 13-14. Repeatedly, Defendants have attempted to conflate these two unrelated cases, arguing Plaintiffs' position in this case, that Aftermath's purported licensing of Plaintiffs' compositions to Apple to offer as permanent downloads was unauthorized and constituted copyright infringement, conflicts with the position taken by the plaintiffs in *F.B.T.*, that a certain royalty applied to the permanent download and Mastertone exploitation of *sound recordings* wholly owned by Aftermath. As this Court is aware, compositions and sound recordings have separate copyrights. *E.g.*, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005). The recording contracts at issue in this case grant Aftermath and/or its owners the copyright to the sound recordings created thereunder, but ownership of the composition copyrights remains with Plaintiffs Eight Mile Style and Martin Affiliated. This case touches only on whether Defendants' actions violated Plaintiffs' copyrights in the compositions. Defendants' reference to the *F.B.T.* case, raised yet again, is nothing more than a red herring.

CONCLUSION

Plaintiffs respectfully request their motion be granted.

Dated: August 31, 2009 Respectfully submitted,

/s/ Richard S. Busch	/s/ Howard Hertz
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via the Court's Electronic Filing System:

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this 31st day of August 2009.

s/ Richard S. Busch